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PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ASSIGNMENTS FOR CREDITORS.

Following *Barth* v. *Backus*, 140 N. Y. 230, and *Townsend* v. *Cope*, 151 Ill. 62, it was held in *Security Trust Co.* v. *Dodd*, 19 Sup. Ct. 545, that an assignment for creditors, executed under a Minnesota statute which practically created an insolvent law by providing that only releasing creditors should share in the assigned estate, passed no title to property outside of the state as against an attaching creditor (even with notice) in another state.

Extra-territorial Effect

ASSOCIATIONS.

It has sometimes been argued that a by-law, under which a member of an association may be expelled without any opportunity for defence on his part, is illegal, and that any proceedings taken under such a law are of no legal effect. In *Berkhout* v. *Supreme Royal Arcanum*, 43 Atl. 1, the Supreme Court of New Jersey places a qualification on this rule, which is stated in the following words: "A by-law which provides for the expulsion of a member without affording him an opportunity of defending himself against the charges upon which his expulsion is based is not altogether null and void, but only so to the extent that it deprives such member of a hearing from which he might possibly derive a benefit; and where it conclusively appears that no such result has followed its enforcement, the existence of such a provision in it will not be held to invalidate the proceedings taken under it.

Expulsion of Member, Opportunity for Defence

Applying this qualification to the facts of the case, the court sustained an expulsion under a by-law providing for a summary expulsion upon proof of the commission of a felony by a member; it appearing that, at the time of his expulsion, the complaining member was in prison for the crime, and a notice to attend the meeting of the inquiry committee could not possibly have been acted upon by him; moreover, since he had

ASSOCIATIONS (Continued).

confessed the commission of the crime in open court, the result of an inquiry by the committee in his presence would have necessarily been the same.

The first of these two reasons does not seem to be very strong, since even if the member could not have appeared personally, he might have been represented by his attorney.

BANKRUPTCY.

In re Camp, 91 Fed. 745, determines some new points under the new bankruptcy law: (1) That it is the duty of the trustee, under § 47, to set apart his exemption to the bankrupt without reference to any action by state officials; (2) That, following the Georgia decision, but apparently, also, with the court's own approval, a bankrupt partner is entitled to exemption out of the firm assets, provided, however, that upon an adjustment of the firm accounts it appears that he has any equity therein. The numerous conflicting decisions on the latter point are well collated.

New Act

BANKS AND BANKING.

Bank v. *Dearing*, 91 U. S. 29, went a long way in the protection afforded to instrumentalities of the United States Government, when it held that national banks are not affected by the penalties of state usury laws. *Gadsden* v. *Thrush*, 78 N. W. (Neb.) 632, limits this privilege by deciding that the exemption from liability does not apply to a mortgage given to a third person to secure a usurious loan made by the bank.

National Banks, Usury

BILLS AND NOTES.

Lindley v. *Hoffman*, 53 N. E. (Ind.) 471, reminds us of an exception to the general rule that a blind man, who signs an instrument on the faith of hearing it read by another, is not liable to a *bona fide* holder for value if he has been deceived by a fraudulent and incorrect reading of the note. In this case the answer of defendant merely alleged that defendant was compelled to rely on the faith of the payee, who read the note to him, but it did not set forth any facts which showed that defendant might not have procured a disinterested person to read the note and acquaint him of its contents. For this reason the answer was held insufficient to rebut the inference of negligence on defendant's part.

Fraud in Reading Note to Blind Man, Estoppel

CARRIERS.

Street Railway, Passenger, Negligence

The Supreme Court of Pennsylvania has applied the relation of carrier and passenger to the following rather novel case: Plaintiff, who had taken passage on an electric car, purchased an exchange ticket to ride in another direction on defendant's line, and, on leaving the car, walked some distance to the junction where she was to take the connecting car. The latter arrived at the junction, and, since that was the end of its route, the seats and the trolley pole were reversed. Plaintiff had just left the pavement to take her seat in the car, when the pole, which was being pulled around, broke, and inflicted a severe injury upon her.

The court held as a matter of law that, while plaintiff might have ceased to be a passenger when she left the first car, yet that when she had left the pavement and was almost in the act of getting on the second one, she was, to all intents and purposes, within the custody of the defendant company and entitled to the rights of a passenger; therefore, in the absence of other evidence, a *prima facie* case of negligence against the defendant had been proved: *Keator* v. *Traction Co.*, 43 Atl. 87.

Limitation of Liability Printed on Ticket

The Supreme Court of Vermont has added another to the many decisions holding that a printed notice on the back of a railroad ticket limiting the liability of the carrier does not constitute a contract between the carrier and the passenger. The question involved in such cases is that only of assent to the conditions. "Assent will not be presumed unless the proposed limitations are known by the passengers, and then much will depend upon whether they are reasonable or unreasonable. If not entirely reasonable, assent will not be presumed from knowledge merely, because the carrier, without such assent, is under the common law liability, and has the passenger at a disadvantage. The passenger's circumstances and necessities may be such as would compel him to assent to almost any conditions or limitations. Hence, when the conditions or limitations are not entirely reasonable, it is generally held that the assent to them will not be implied from a knowledge of them, but express assent must be established." In this case the condition was the familiar limitation of liability for wearing apparel to the value of $100, and the evidence did not even establish the knowledge of plaintiff as to its existence: *Ranchan* v. *Rutland R. R. Co.*, 43 Atl. 11.

CONSTITUTIONAL LAW.

Removal from Office, Restriction by Legislature

It seems rather unfortunate that laws made for the benefit of veteran soldiers so often fail of their object, generally because their enthusiastic framers forget the existence of the constitutions of the state and the United States. The Pennsylvania Act of May 26, 1897, P. L. 107, provided that Union soldiers occupying public positions should not be discharged without reasonable cause. Article VI, § 4, of the Constitution of Pennsylvania, provides that "appointed officers, other than the judges of courts of record and the superintendent of public instruction, may be removed at the pleasure of the power by which they shall be appointed." When it was attempted to apply the above act to the case of a warden of a county prison appointed by the county commissioners, Judge Pershing intimated (although the point of the constitutionality of the act was not directly before the court, on account of an obscurely worded proviso) that the act was, in general, an attempt to nullify the discretionary power of removal given to the appointing bodies; and the fact seems plain. Judge Pershing's decision was affirmed *per curiam* by the Supreme Court, though this can scarcely be taken to be a definite ruling on the constitutionality of the act: *Brower* v. *Kantner*, 43 Atl. 7.

Taxation, Assessment by Front Foot, Due Process

In *Loeb* v. *Trustees of Columbia Township*, 91 Fed. 37, the United States Circuit Court for the Southern District of Ohio has declared unconstitutional a statute assessing the cost of a road improvement upon the abutters by front foot. An assessment such as this, made without regard to special benefits, takes private property without due process of law. This decision follows the recent case of *Norwood* v. *Baker*, 19 Sup. Ct. 187, in which the Supreme Court of the United States, by a divided court (Gray, Brewer and Shiras dissenting), condemned assessment by frontage. Brewer, J., who dissented in the latter case on the ground that "it is, beyond question, a legislative function to determine the area benefited by such improvements, and the legislative determination is conclusive," is supported by Cooley, Taxation, 2d Ed., p. 644, *et seq.*, and Dillon, Munic. Corp., 4th Ed., Vol. 2, § 752. *Ageus* v. *Newark*, 37 N. J. L. 416, and *Philadelphia* v. *Rule*, 93 Pa. 1 (1880), support the majority opinion.

CONTRACTS.

In *Cooney* v. *Lincoln*, 42 Atl. 867 (Supreme Court of Rhode

CONTRACTS (Continued).

Island), which was an action for personal injuries, the plaintiff's replication to defendant's plea of a general release from the plaintiff for the grievances complained of, set forth that the release was obtained from the plaintiff while she was suffering from the injuries for which the suit was brought, and while she was under the influence of opiates, and not in the possession of her full mental powers. Held, that the replication should have averred either that plaintiff's lack of mental capacity at the time of making the release was so great as to render her incapable of understanding the effect of the instrument, or that defendant had notice of her mental condition when he procured the release.

Mental Capacity of Party

CRIMINAL LAW.

Section 2194 of Burns' Rev. Statutes of 1894 (Indiana) provides that whoever shall "sell, barter, or give away" any liquor on certain days shall be subject to a penalty. The Appellate Court of Indiana occupies nine columns of the *Northeastern Reporter* in proving that this statute does not render criminal a gentleman who invites some friends to his rooms and opens a bottle of champagne for them as an act of hospitality: *Austin* v. *State*, 53 N. E. 481.

Sale or Gift of Liquor

The subject of gifts and sales of intoxicating liquors is exhaustively treated by Luther E. Hewitt, Esq., in 38 AMERICAN LAW REGISTER, 17.

DECEDENTS' ESTATES.

The Court of Chancery of New Jersey has recently construed the New Jersey Statute (P. L. 1887; 3 Gen. St. p. 3763, § 34), which prevents the lapsing of legacies in certain cases. The statute provides, *inter alia*, that when an estate is devised or bequeathed to any child of the testator, and that child shall die within the lifetime of the testator, leaving any child who shall survive the testator, the estate shall not lapse, but "shall vest in such child . . . in the same manner as if such legatee or devisee had survived the testator or testatrix and had died intestate."

Lapsed Legacy, Vested Interest

In *Suydam* v. *Voorhees*, 43 Atl. 4, a legacy to a deceased child was claimed by his child, and the question was whether or not the legacy was subject to a debt of the claimant's father. Relying on the words, "*shall vest*," in the statute the court

DECEDENTS' ESTATES (Continued).

held that the legacy was not so liable, but noted the fact that the contrary result has been reached in the interpretation of the corresponding English statute. See *Eager* v. *Furnivall*, 17 Ch. D. 115.

EVIDENCE.

In an action against a natural gas company for an oversupply of gas, whereby a gas stove was overheated and the house burned down, it appeared that the supply of gas was uniform to all houses throughout the city, but that the supply to each house was regulated by an appliance called a "mixer," of which the consumer possessed the key, and that it was in his power to shut off or regulate the supply.

Res inter Alios Acta

The trial court admitted evidence to the effect that on the night of the fire stoves of other residents in the city were overheated. This was held to be error by the Appellate Court of Indiana, in that there was no proof that the witnesses' "mixers" were admitting the same amount of gas as that of the owner of the house which had been burned: *I. N. & I. Gas Co.* v. *N. H. Ins. Co.*, 53 N. E. 485.

HUSBAND AND WIFE.

Johnson v. *Johnson*, 49 S. W. (Tenn.) 305, decided that a petition by a husband to be credited for excessive income paid to his wife under an order of alimony is not demurrable, on the ground that it is a suit by husband against a wife.

Right to Sue

Some of the Western states allow a deserted wife, instead of suing for a divorce, if she prefers, to bring an action for maintenance to compel her husband to contribute permanently to her support. In *McMullin* v. *McMullin*, 56 Pac. (Cal.) 554, after such suit brought, the husband, in good faith, offered to return and furnish his wife with a home. It was held that this furnished a defence to the suit, not because of any tenderness for delinquent husbands, but because of the law's aversion to the separation of spouses.

Desertion, Action for Maintenance

In re Neff, 56 Pac. (Wash.) 383, decides that the decree of a divorce court, awarding the custody of the children to the

HUSBAND AND WIFE (Continued).

Divorce, Custody of Children

injured mother, is at best only temporary; and upon the death of the mother, the father, in the absence of evidence of his unfitness, is entitled to recover their custody as against the testamentary guardian of the mother.

Antenuptial Contract

In *Kistler* v. *Ernst*, 56 Pac. (Kan.) 18, it was properly held that the rights of a husband in his deceased wife's estate are not to be taken away except by plain language. His antenuptial agreement that she might will it to whom she chose, was held, therefore, not to estop him from claiming as her heir upon her death intestate.

Wife's Right to Sue for Personal Injuries

The courts are but slowly getting away from the common law conception of the relation of husband and wife. In *Samarzevosky* v. *Baltimore Rwy. Co.*, 42 Atl. (Md.) 206, the common law rule that husband and wife must sue jointly for injury to wife was adhered to, although the Maryland Act of 1892 reserved to a married woman her own property. A mere right of action, says the court, is not property. This has been remedied by an act passed in 1898.

MASTER AND SERVANT.

Fellow-servants

Meyer v. *Illinois Central R. Co.*, 52 N. E. (Ill.) 849, decides, following *Railroad Co.* v. *Baugh*, 149 U. S. 368 (a case of an engineer), that a conductor is only a fellow-servant of a brakeman, not a vice-principal. "The fact that one of the number of servants is invested with power to control and direct the actions of others, will not in itself render the master liable for the negligence of the governing servant." The difficulty of deciding the fellow-servant problem is seen in *Chicago & E. I. R. Co.* v. *Driscoll*, 52 N. E. (Ill.) 921, where the court held, as matter of law, that the members of two switching crews are fellow-servants.

Fellow-servants

Kincade v. *Chicago, M. & St. P. Ry. Co.*, 78 N. W. (Ia.) 698, was a case where the plaintiff was thrown from a train on which he was employed as the result of a quarrel between two employes. In spite of a statute making a railroad company liable in general for the negligence of a co-employe, it was held that the company was not liable, because the guilty employe, in striking the blow, was not acting within the scope of his employment.

MORTGAGES.

Clifford v. *Minor*, 78 N. W. (Minn.) 861, follows the familiar rule that the purchase of premises, subject to mortgage, is not liable personally for the mortgage debt except upon proof of his promise to pay it.

Assumption

Weadock v. *Noeker*, 78 N. W. (Mich.) 669, holds that a junior mortgagee, who pays taxes to protect his mortgage, has a lien for the amount of the taxes superior to that of the senior mortgagee.

Payment of Taxes

In Michigan unrecorded mortgages, whether of real or personal property, are void as against creditors. In *Baker* v. *Parkhurst*, 78 N. W. (Mich.) 643, this principle was applied. It appeared that the mortgaged property had been sold by the mortgagor to a third party with the consent of all parties in interest, and the proceeds paid to the mortgagee on account of the mortgage. It was held that, in legal effect, this was the same as if the property had been sold under the unrecorded mortgage, and the proceeds were, therefore, attachable by the creditors, who had given credit while the mortgage was kept off the record.

Failure to Record

Even in these days railway mortgages do not always and of necessity cover after-acquired property, as is proved by the case of *Louisville Trust Co.* v. *Cincinnati Inclined Plane Rwy. Co.*, 91 Fed. 699. The mortgage, executed in 1879, covered "the railways, rails, bridges and real estate," "all and singular the cars and rolling stock," the franchises and property of the company, etc. It was held that these words, not referring to after-acquired property, included simply the railways, cars and property of the company then in existence. The additional words, "tolls, incomes, issues and profits," were held, however, to cover such additional new rolling stock as was necessary for the acquiring of income.

After-Acquired Property

NEGLIGENCE.

In an action against a railroad for insanity, resulting from a nervous shock received in a collision, it appeared that in two instances after the collision plaintiff had been a witness of other accidents on the same road, and it was questionable whether her insanity had not been induced from the horrible sights seen in the latter cases. The trial judge charged the jury that if plain-

Proximate Cause, Insanity from Sight of Accidents

NEGLIGENCE (Continued).

tiff's insanity was caused by either of the two latter accidents, or even by them in conjunction with the accident in which plaintiff was injured, then their verdict must be for the defendant. Counsel for the defendant excepted to this charge—for what reason it is rather hard to see. The Supreme Court of Massachusetts overruled the exceptions without comment: *Rooney* v. *N. Y., N. H. & H. R. Co.*, 53 N. E. 435.

Res Ipsa Loquitur, Electric Wires

The sensible rule of applying the doctrine of *res ipsa loquitur* to the cases of broken electric wires, is now becoming general. Thus the Court of Appeals of New Jersey has properly held that where a broken telephone wire had fallen across an unguarded trolley wire and hung down into the street, so that plaintiff, who picked up the end to remove it from the path of his horse, was injured, the questions of the negligence of the telephone company and the trolley company, as well as that of plaintiff's contributory negligence, were for the jury: *N. Y. & N. J. Tel. Co. et al.* v. *Bennett*, 42 Atl. 750.

PARTNERSHIP.

Mortgage of Partner's Interest in Firm Property

There is no principle of law better settled than that when a partner sells or mortgages firm property; he conveys only his interest in the firm after the debts are paid, and the grantee gains no title to any specific chattels. In reaching this result, however, the Supreme Court of Indiana uses language, which intimates that this court has joined the rapidly-growing number of those who recognize the entity of a partnership apart from the partners, just as the entity of a corporation apart from the stockholders.

"While, in fact, a partnership is composed of individual members, still a firm so constituted is recognized as a distinct legal entity different and distinct from the persons who compose it. Therefore the principle is universally recognized that a partner's interest in or title to the firm property is not an interest in or title to any specific property. The effects or property of the partnership belong to the firm so long as it exists, and not to the members who compose it:" *Johnson* v. *Shirley*, 53 N. E. 459.

REAL PROPERTY.

Lease, Provision for Disposal of Rent after Death of Lessor

In *Murray* v. *Crozer*, 53 N. E. 477, A leased land with a provision in the lease that after A's death the rent should be paid to his wife for life. The Appellate Court of Indiana held the provision void for two reasons: (1) Since rents, being in the nature of chattels real and annexed to the realty, are incidents of the reversion and pass to the heir, the owner of the land cannot alien that portion of them which become due after his death, and (2) since this was in effect a testamentary disposition of property and lacked the formalities required by the statute of wills.

Tenant for Life, Waste, Accidental Burning of House

In *Sampson* v. *Grogan*, 42 Atl. 713, the Supreme Court of Rhode Island gives a learned opinion on the subject of waste by tenants for life. The defendant in the case was the executor of a life tenant, who held the property under a will which provided that she (the life tenant) was to occupy the house for life, "she to keep the same in repair." The house was accidentally burned during her tenancy, and this action was brought after her death against her executor by the remainderman.

The court, after examining all the authorities, English and American, since the statutes of Marlbridge and Gloucester, comes to the conclusions (1) that under Gen. Laws, R. I., c. 268, providing that a life tenant who shall commit or suffer waste shall forfeit the place wasted and double the amount of the waste, the life tenant in this case was not responsible, and (2) that the implied promise of the tenant to keep the house in repair was not broad enough to render her liable for an accidental fire, although the court admits that it would have been otherwise had she been in possession under a lease.

SALES.

Implied Warranty

The Supreme Court of Vermont adheres to the strict rule of *caveat emptor* in *Warren* v. *Buck*, 42 Atl. 979, and holds that a farmer selling hogs to a butcher, knowing that the latter intends to convert them into pork for resale to his customers, does not impliedly warrant them to be fit for use as food.

SURETYSHIP.

Resignation of Principal

It hardly required the authority of a decided case to show that the mere acceptance of the resignation of a defaulting official does not release his surety from liability: *Stemmerman* v. *Lilienthal*, 32 S. E. (S. C.) 535.

TRADE-NAME.

Laches, Bar to Equitable Relief

Two firms in the same business, the Tygerts and the Allens, formed a corporation under the name of the Tygert-Allen Company, and agreed to allow it to use their trade-names as far as they should apply or become necessary in the business. The Tygert-Allen Company continued in business for some time, during which it did not use the name "Tygert" on its goods, but advertised them as "Allen's Phosphates," etc. Subsequently a new corporation, called the Tygert Company, was formed by some of the members of the Tygert-Allen Company, and used the name "Tygert" for their trade-name.

In a bill in equity for an injunction to prevent the Tygert Company from using this trade-name, the Supreme Court of Pennsylvania decided that the fact that complainant had been content to see the defendant use the name "Tygert" for three years without any objection and without any attempt by complainant to use it, was sufficient to bar complainant from equitable relief: *Tygert-Allen Co.* v. *Tygert Co.*, 43 Atl. 224.

TRIAL.

Newspaper Comments, New Trial

Scarcely a month passes in which an attorney does not demand a postponement of a case or a new trial, etc., on account of what appears in the newspapers. In *Ill. Cent. Rwy. Co.* v. *Souders*, 53 N. E. 408, which was an action against a railroad for personal injuries, the defendant, on a motion for a new trial, offered an affidavit that there had appeared in the newspapers of Chicago during the trial notices of the suit, and statements that on a former trial plaintiff had been awarded a verdict of $15,000, which affiant believed had found their way to the jury room. But since no opinion on the merits of the case had been stated in the newspapers, the trial court very properly refused to grant a new trial on that ground, and its decision was sustained by the Supreme Court of Illinois.

TRUSTS.

Deposit in Savings Bank, Declaration of Trust

The vexed question as to whether a declaration of trust made by a person placing money in a bank creates a valid trust, if it does not come to the knowledge of the *cestui que trust*, has come before the Court of Appeals of Maryland. Money was deposited by A in a savings bank and the following memorandum was made on the pass book: "Metropolitan Savings Bank, in account with A. In trust for herself and B, joint owners, subject to the order of either; the balance at the death of either to belong to the survivor."

The court held this to be a valid declaration of trust, and B was entitled to claim the whole fund on A's death, notwithstanding the fact that she was unaware of the creation of the trust and that A had retained the book during her life: *Milholland* v. *Whalen*, 43 Atl. 43.